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IN THE

Supreme Court of the United States

October Term 1952
No. 176

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Petitioner,

vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Raymond M. Crane, doing business as Associated Fruit Distributors, respectfully prays that a writ of certiorari issue from this court, in the above entitled action, to review a final decision of the United States Court of Appeals, for the Ninth Circuit, dismissing an appeal taken by petitioner Crane (respondent in the District Court) from a judgment of said District Court, said order of dismissal having been entered on April 14, 1952, a petition for rehearing having been denied on May 15, 1952.

This matter was before the above entitled Court during the October, 1951, term on a Petition for a Writ of Cer-

tiorari filed by Crane to review a final judgment of the United States Court of Appeals for the Ninth Circuit reversing a judgment of the District Court in favor of Crane. Denunzio had appealed from the judgment. Certiorari was denied October 8, 1951. (Law. Ed. Adv. Sheets, Vol. 96, p. 30, Case No. 109.)

The questions of law which Crane seeks to review in this Petition were not involved in the former proceeding in this Court or in the Court of Appeals on the Denunzio appeal.

Summary and Statement of Matters Involved.

This matter originated in a proceeding filed by Joseph Denunzio Fruit Company, a corporation (hereinafter referred to as Denunzio) against Raymond M. Crane, doing business as Associated Fruit Distributors (hereinafter referred to as Crane) and John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as Kazanjian) before the Secretary of Agriculture, under the Perishable Agricultural Commodities Act of 1930, as amended.

In its amended complaint Denunzio alleged that Crane, either as principal or as agent for Kazanjian, or as both, contracted to sell to Denunzio three carloads of grapes at a price of $2.50 a box, that the grapes were never delivered and complainant was damaged in the sum of $5,723.50. [R. Vol. I, pp. 17-28.]

Crane, by answer, denied acting as either principal or agent for Kazanjian and alleged that he was acting solely as a buying broker for Denunzio; denied the existence of a binding or valid contract; alleged that certain conditions precedent to a binding contract were never performed by

Denunzio and denied that Denunzio was damaged. [R. Vol. I, pp. 49-52.]

Kazanjian, by answer, denied entering into the contract. [R. Vol. I, pp. 53-62.]

After the trial before the Secretary of Agriculture an order was made for Crane to pay to Denunzio the sum of $5,723.50, together with interest. [R. Vol. I, p. 79.]

Crane thereupon appealed to the United States District Court for the Southern District of California, Central Division, and a trial *de novo* was had before the Honorable J. F. T. O'Connor, Judge of said court. [R. Vol. I, p. 2.]

Judge O'Connor held the contract to be valid and enforceable and rejected various other defenses urged by Crane and affirmed the order of the Secretary of Agriculture and awarded Denunzio an attorney's fee in the sum of $3,000.00 for the services of its attorneys in defending Crane's appeal. [R. Vol. I, pp. 139-152.]

Crane filed a motion for a new trial but before the same could be heard Judge O'Connor died. [R. Vol. I, pp. 155-161.]

Thereafter said motion was presented to Judge James M. Carter and Judge Carter held that the contract sued upon was for the sale of merchandise at a price in excess of the O. P. A. ceiling and void under the Emergency Price Control Act; that a new trial was not necessary, and the court thereupon ordered that said action be dismissed. [R. Vol. I, pp. 164-184.]

Denunzio appealed from the ruling of Judge Carter and the United States Court of Appeals for the Ninth Circuit on April 16, 1951, rendered a decision vacating the conclusions of law entered by Judge Carter and setting aside

and reversing the judgment rendered by him "with directions to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor." A petition for rehearing was denied May 10, 1951. [R. Vol. I, pp. 268-274.]

Thereupon Crane sought certiorari in this Court to review the decision of the Court of Appeals holding, in effect, that said contract was valid and enforceable. Certiorari was denied. (Law. Ed. Adv. Sheets, Vol. 96, p. 30, Case No. 109.)

Thereupon the findings of fact, conclusions of law and judgment of Judge O'Connor were adopted as the findings of fact, conclusions of law and judgment of Judge Carter, and judgment was entered accordingly. [R. Vol. II, pp. 280-296.]

Thereupon Crane appealed to the United States Court of Appeals for the Ninth Circuit from the judgment so entered by Judge Carter [R. Vol. II, p. 297], and in his statement of points on which Crane intended to rely upon said appeal, he presented the following questions of law:

1. Was a contract entered into?
2. Were the terms of the contract agreed upon by the parties?
3. Did Denunzio perform the conditions precedent to the existence of a contract, or did he breach the contract?
4. Is the contract void under the Statute of Frauds?
5. Crane having disclosed to the purchaser the name of Kazanjian as seller, was Crane as agent for Kazanjian, liable for Kazanjian's default?
6. Denunzio having acquiesced in the alleged breach of the contract, was the value of the grapes at the time

of acquiescence a determining factor in fixing damages?

7. Did the trial court err in allowing Denunzio $3,000.00 attorney's fees?
8. Were the findings of fact supported by the evidence and were the conclusions of law supported by the findings of fact? [R. Vol. II, pp. 300-303.]

Thereupon Denunzio made a motion before the Court of Appeals to dismiss Crane's appeal on the ground that the judgment of the District Court entered by Judge Carter, being entered pursuant to the mandate of the District Court of Appeal on the Denunzio appeal, was "not appealable." [R. Vol. II, pp. 307-312.]

The authorities relied upon by Denunzio laid down a rule that to permit such appeal would, in effect, be an appeal to the Appellate Court from its own decision. [R. Vol. II, pp. 312-316.]

Thereupon Crane filed objections to the granting of said motion on the grounds:

1. That the questions of law now sought to be reviewed on Crane's appeal were non-existent on the Denunzio appeal because the judgment was in favor of Crane.
2. That the questions of law now sought to be reviewed on the Crane appeal were not decided on the Denunzio appeal.
3. That the rule relied upon by Denunzio did not apply to the facts in the case at bar. [R. Vol. II, p. 317.]

The Court dismissed the Crane appeal and denied a rehearing. No written opinion was rendered by the Court in either instance. [R. Vol. II, pp. 325-326 and 338.]

The Denunzio appeal (that is, the first appeal) was taken on the judgment roll. Denunzio's opening brief shows that the only question raised was that the contract sued upon was not void as being in violation of the Emergency Price Control Act. [R. Vol. II, p. 331.]

The (1) specifications of error, (2) summary of arguments, and (3) the questions of law argued by Denunzio in his Opening Brief on the Denunzio appeal are set forth in the record. [R. Vol. II, pp. 331-337.] They show that the only question presented and decided was as to the validity of the contract under the Emergency Price Control Act.

In considering the Denunzio appeal the Court of Appeals, in its opinion, stated as follows:

> "The primary question presented by this appeal has to do with the legality of the contract. We have carefully considered the fact situation presented by this record and the findings of fact and conclusions of law entered by both trial judges. Upon this record we are satisfied that Judge O'Connor's findings of fact are supported by substantial evidence, and that his conclusions of law are supported by his findings of fact. We think that Judge Carter erred in setting aside these findings of fact and conclusions of law and that the conclusions of law entered by Judge Carter are erroneous." [R. Vol. I, p. 268, *et seq.*]

In his findings of fact Judge O'Connor found that Crane was the agent of Kazanjian. [R. Vol. I, pp. 173-175.] Crane had contended that he was the agent or buying broker for Denunzio. [R. Vol. I, pp. 49-52.] Judge Carter adopted the findings of fact of Judge O'Connor, but made different conclusions of law. [R. Vol. I, pp. 164-184.]

Crane filed a cross-appeal from Judge Carter's judgment and on said cross-appeal Crane contended that even though Judge Carter may have erred in holding the contract to be void, still the evidence (which was presented in the record on appeal) showed Crane to be the agent and buying broker of Denunzio and therefore he (Crane) would not be liable for damages arising out of the failure of Kazanjian to deliver the grapes. [R. Vol. II, pp. 322-324.]

With reference to the cross-appeal the Court of Appeals stated:

> "The cross appeal of Crane relates to the question of whether Crane was acting on behalf of the buyer or the seller. We are satisfied that the findings in this regard are amply supported by substantial evidence and that the conclusions of Judge O'Connor are supported by the findings." [R. Vol. I, p. 272.]

Statement Disclosing Basis of Jurisdiction of Supreme Court.

This proceeding was filed before the Secretary of Agriculture of the United States Department of Agriculture under a federal law, viz: The Perishable Agricultural Commodities Act of 1930, as amended, and under the provisions of said Act the United States District Court had jurisdiction to review the decision of the Secretary of Agriculture on a trial *de novo*.

The United States Court of Appeals had jurisdiction to review the decision of the United States District Court.

The Supreme Court has jurisdiction to review any judgment of the United States Court of Appeals.

The Questions Presented.

1. Where the District Court renders a judgment in favor of the plaintiff and on a motion for a new trial the judgment is vacated and the action ordered dismissed because the contract sued upon was found to be void under the Emergency Price Control Act, and on appeal the only question raised by the plaintiff (appellant) was as to whether the contract is valid under the Emergency Price Control Act and the Court of Appeals holds that the contract is valid and orders the original judgment reinstated, can the defendant on an appeal from the reinstated judgment raise questions which were not raised or decided on the first appeal?

2. Under the facts above mentioned where certain questions of law were non-existent on the first appeal because of the judgment of the trial court was in favor of the defendant, can the defendant on a later appeal raise questions which then became material because of a new and different judgment against said defendant?

Reasons Relied Upon for Allowance of a Writ.

The Court should issue the writ herein prayed for for the following reasons:

1. The ruling of the Court of Appeals in refusing to consider questions raised on a second appeal which were not, and could not be, considered on a first appeal in a case arising under federal laws, decide a federal question in a way which is in conflict with applicable decisions of this Court.

2. The ruling of the Court of Appeals in refusing to consider questions raised on a second appeal which were not, and could not be, considered on a first appeal

in a case arising under federal laws, decided a federal question in a way that is in conflict with decision of Courts of Appeals for another circuit.

3. For the purpose of securing uniformity of decisions of the United States Courts of Appeal for the various circuits, the Eighth Circuit Court having decided the same question differently from the decision of the Ninth Circuit in the case at bar.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket as "Joseph Denunzio Fruit Company, a corporation, Complainant and Appellee vs. Raymond M. Crane, dba Associated Fruit Distributors of California, Respondent & Appellant, John C. Kazanjian, dba Red Lion Packing Company, Respondent & Appellee, No. 13223," and that said judgment of the Court of Appeals may be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioner will ever pray.

BENJAMIN W. SHIPMAN,
Counsel for Petitioner.

HENRY O. WACKERBARTH,
Of Counsel.

Certificate of Counsel.

Benjamin W. Shipman, counsel for petitioner in the above entitled proceeding, does hereby certify that the foregoing petition is well-founded and not interposed for delay.

BENJAMIN W. SHIPMAN.

IN THE

Supreme Court of the United States

October Term, 1952.

No. .....

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Petitioner,

vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below and of Secretary of Agriculture.

The order of the Secretary of Agriculture is dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139. [R. Vol. I, pp. 63-79.]

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. [R. Vol. I, pp. 82-137, 139-152.]

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962. [R. Vol. I, pp. 164-179.]

The decision of the United States Court of Appeals on the Demunzio appeal was rendered and filed April 16, 1951. [R. Vol. I, pp. 268-274.] It is reported in 188 F. 2d 569. Petition for rehearing was filed May 9, 1951, and denied May 10, 1951. [R. Vol. I, p. 274.] Certiorari was denied October 8, 1951, 96 L. Ed., Adv. Sheets, p. 30, case 109.

No opinion was written by the Court in granting the motion to dismiss or in denying the rehearing. [Minute Orders, R. Vol. II, pp. 325-338.]

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture in this proceeding is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499 (f) (g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo*, the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statement of Facts.

A statement of the matters presented to the Secretary of Agriculture, the United States District Court and the United States Court of Appeals is set forth in the petition for writ of certiorari, under the heading "Summary and Statement of Matters Involved," and the same is hereby adopted and made a part of this brief.

The facts are as follows:

Demunzio is a wholesaler having its place of business at Louisville, Kentucky; A. B. Rains, Jr., is a food broker at Louisville, Kentucky; Crane is a broker or car lot distributor having his place of business at Los Angeles, California; Kazanjian is a grower, packer and broker at Exeter, Tulare County, California. [R. Vol. I, pp. 139, 140, 171 and 172.]

On September 20, 1944, Crane sent a form telegram to thirteen different brokers throughout the United States, stating that he could book eighteen cars of Emperor grapes, the same to go in storage commencing October 9th, shipper to transfer title on or after December 10th, packed 28 pounds net, he paying all storage charges, $500.00 part payment with confirmation, price $2.53 net to shipper, Crane charging $50.00 per car procurement charge. The telegram contained the code word "Adlam" which means "offer subject to confirmation." One of these form telegrams was sent to A. B. Rains, Jr., of Louisville, Kentucky. [R. Vol. I, pp. 198-202.] In a teletype conversation which followed between Crane and Rains on September 28th, Rains offered to take four cars of grapes on terms different than offered. Crane replied that the matter would have to be put up to the shipper as the deal was based exactly as we told you. [R. Vol. I, p. 227.]

On September 28th Crane wired Rains that it was impossible to make a deal except as quoted in his night letter (referring to his night letter of September 26th). [R. Vol. I, p. 203.]

On October 2nd Crane sent out another form telegram to the same brokers referring to the night letter of September 26th and quoting fifteen cars U.S. One at $2.50 net on the same deal, asking for the parties to wire quick if they wanted any part of the deal. [R. Vol. I, p. 205.] As the result of a teletype conversation between Crane and Rains, Rains approved a sale of three cars of grapes to Krotzki, another commission merchant that he represented [R. Vol. I, p. 230] and thereafter and on October 2nd Crane telegraphed Rains as follows:

> "Talked shipper Red Lyon Packing Company Confirms Kortski Necessary 750.00 car airmail deposit with signed confirmation Emperors available now Only two more cars possibly three same base." [R. Vol. I, p. 206.]

In a teletype conversation which occurred on October 3rd between Rains and Crane, each party orally confirmed two cars to Krotzki and three cars to Denunzio, and Crane stated that they would airmail confirmations for buyer's signature, and Rains stated he would airmail checks with signed confirmation when he received your (Crane's) copies. [R. Vol. I, p. 234.]

On October 3rd Rains mailed Crane a Standard Memorandum of Sale showing two cars of grapes sold to Denunzio for account of Associated Fruit Distributors. [R. Vol. I, pp. 236-238.]

On October 3rd Crane wired Kazanjian the facts with reference to the purchases and Kazanjian wired back stating they were satisfactory but injecting some new terms into the deal. [R. Vol. I, pp. 217-218.]

On October 10th Crane wired Rains:

> "Shipped (r) Red Lion takes view account ceiling lifted any contracts Emperors voided * * *." [R. Vol. I, p. 209.]

Kazanjian refused to ship the grapes.

The $750.00 cash deposit was never paid. [R. Vol. I, p. 143.] The seller and buyer never signed a written confirmation and the buyer never paid Crane the $50.00 procurement charge. [R. Vol. I, pp. 139-144.]

On October 15, 1944, Denunzio ordered three cars of Emperor grapes from Arena & Co. of Los Angeles, California, to replace the three cars which Red Lion signified it would not ship, the purchase price was $3.50 a box plus 20¢ a box storage from October 15, 1944, to December, the grapes being bought for December delivery. These cars were shipped to Denunzio.

At the trial of the action Denunzio took the position that only one of the cars ordered from Arena was a replacement car and that two other carloads of grapes which he purchased during the month of January, 1945, from other persons at $4.50 a box were two of the replacement cars.

Judge O'Connor accepted Denunzio's version of the replacement cars and allowed as damages—the difference be-

tween $2.50 a box and $3.70 a box on one of the cars purchased from Arena, and allowed the difference between $2.50 and $4.50 a box on the cars purchased from the other persons.

IV.
Specifications of Error.

The Court of Appeals erred:

1. In dismissing the appeal taken by Crane and in denying a rehearing of said matter.

2. In holding that the judgment which Crane appealed from was not appealable.

3. In refusing to consider on the Crane appeal questions of law which were not, and could not have been raised or considered on the Denunzio appeal.

4. In refusing to consider on the Crane appeal questions of law which were non-existent in the Denunzio appeal.

5. In holding that a judgment entered by the trial court in accordance with the mandate of the Court of Appeals, cannot be appealed from by the adverse party in order to raise questions of law which were not, and could not have been, considered on the first appeal.

V.

Summary of Argument.

Point "A." The rule that an appellate court will not entertain an appeal from a judgment entered in accordance with its mandate applies only where the questions decided on the first appeal are sought to be reviewed on the second appeal.

Point "B." Considering the reason for the rule contended for by Denunzio, it becomes apparent that the rule does not apply in the case at bar.

Point "C." On a second appeal the Court may consult its opinion on the first appeal to determine what was intended by its mandate.

Point "D." The questions now sought to be reviewed were not, and could not have been, reviewed by the Court of Appeals on the Denunzio Appeal.

Point "E." The questions now sought to be reviewed by appellant Crane were impliedly decided by Judge Carter in his favor.

Point "F." Questions which might have been, but were not, decided on the first appeal, may be considered on a second appeal where the first judgment was reversed.

Point "G." Crane had no right to appeal from the judgment in his favor and his cross-appeal was defensive only.

ARGUMENT.

POINT A.

The Rule That an Appellate Court Will Not Entertain an Appeal From a Judgment Entered in Accordance With Its Mandate Applies Only Where the Questions Decided on the First Appeal Are Sought to Be Reviewed on the Second Appeal.

The rule herein contended for was laid down by this Court in the case of *Sanford Fork & Tool Co.*, 160 U. S. 247, 40 L. Ed. 414, a case in which the Supreme Court considered and passed upon the questions involved in a second appeal, even though the trial court had entered a judgment in accordance with the mandate of the Supreme Court issued on the first appeal.

In the *Sanford* case, as in the case at bar, the successful party on the first appeal sought to dismiss the second appeal and in holding that the Court had a right to rule upon the question involved on the second appeal this Court stated:

> *"But the circuit court may consider and decide any matters left open by the mandate of this court; and its decisions of such matters can be reviewed by a new appeal only."* (Citing cases.) (Italics ours.)

In *Ex parte Union Steamboat Company*, 178 U. S. 317, 44 L. Ed. 1084, this Court was called upon to consider the effect of a former decision. In the case of *The New York*, 175 U. S. 187, 44 L. Ed. 126, 20 S. Ct. Rep. 67, this Court considered an appeal in a libel case. All questions presented were considered by this Court and rules of law and liability were announced. The judgment of the trial court was reversed and the cause remanded for further proceedings in consonance with its opinion. The rule

laid down was that the damages to the *vessels* should be equally divided. The Union Steamboat Co. requested the trial court to enter a decree dividing the damages to both the vessels and the cargo. The trial court refused and entered a decree dividing the damages to the vessels and assessing the damages to the cargo against Union Steamboat Co. The Union Steamboat Co. sought mandamus to compel a division of the cargo damages. With reference thereto this Court stated:

> "The equal division applied only to the vessels, and, upon the other hand, if petitioner be entitled to the recoupment claimed, it would apparently result in an affirmative decree in its favor. *But no question of recouping one half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court.* It is now insisted that under the cases of * * * this should have been done. This may be so; *but it is an entirely new question,* quite unaffected by the case of the New York, *and if the court erred in refusing to allow such recoupment, the remedy is by appeal* * * *." (Italics ours.)

In the case of *Hinckley v. Morton,* 103 U. S. 764, 26 L. Ed. 458, this Court laid down the rule with reference to second appeals as follows:

> "Second appeals have always been allowed and to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself."

One of the cases relied upon by Denunzio in his motion to dismiss the Crane appeal was the case of *Great Northern Railway Company v. Western Union Telegraph Co.* (C. C. A. 8th, 1909), 174 Fed. 321. This was a case where the Circuit Court of Appeals was called upon to

dismiss the second appeal. In denying the motion the Court stated:

> "On the other hand, *if the mandate of the Appellate Court does not cover the entire case, but leaves something undetermined*, something to be inquired into and adjudicated, *the action of the court below in respect thereof may be reviewed on a second appeal.* * * * (Citing cases.) * * *
>
> *It is quite apparent from the former opinion, to which the mandate referred, that this court did not attempt to settle on the first appeal all the matters in controversy. At least one of those now presented to us by the appellant was involved in the pleadings,* but was left untouched by our former decree; and even though it may be found that the trial court was entirely right in its *disposition of it, the appeal should not be dismissed.*" (Italics ours.)

In the case of *City and County of Denver v. Denver Tramway Corp.* (C. C. A. 8th, 1927), 23 F. 2d 287, the Denver Tramway Corp. sought to enjoin the City of Denver from enforcing certain ordinances. Counsel for the City made a motion in the trial court to dismiss the action, contending that that court had no jurisdiction of the case. The motion was denied and an Interlocutory Injunction was granted. An appeal followed. The question of lack of jurisdiction was urged on appeal. The Circuit Court of Appeals affirmed the order granting the Interlocutory Injunction and affirmed the order denying the motion to dismiss.

On the second appeal the Circuit Court of Appeals was asked to reconsider the former motion to dismiss and the jurisdictional questions.

With reference to other jurisdictional questions presented and which it was claimed were not ruled upon on the first appeal, the Appellate Court stated:

> "But it is strenuously urged by counsel for the City that not all of the jurisdictional questions now sought to be presented to this court were presented on the former appeal. * * * inasmuch as the questions now urged are asserted by counsel to go to the jurisdiction of the court as a federal court, and there may be doubt whether they have heretofore been passed upon, we think that they should be considered at this time."

The questions now sought to be reviewed in the Crane appeal, not having been considered or decided on the Denunzio appeal, are proper objects of review by the Circuit Court and that Court erred in dismissing Crane's appeal.

POINT B.

Considering the Reason for the Rule Contended for by Denunzio, It Becomes Apparent That the Rule Does Not Apply in the Case at Bar.

The reason advanced by the courts for the refusal on a second appeal to reconsider questions decided on the first appeal, is because the law of the case has been established. The courts sometimes refer to the doctrine of *res adjudicata* or the doctrine of *stare decisis*.

In the case of *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 40 L. Ed. 414, the Supreme Court stated the reason for the rule as follows:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court

is bound by the decree *as the law of the case;* and must carry it into execution, according to the mandate." (Italics ours.)

See, also:

Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 L. Ed. 788.

In the case of *Great Northern Railway Co. v. Western Union Telegraph Co.,* 174 Fed. 321, the Court gives the reason for the rule as follows:

"It is the established rule in the courts of the United States that when a case comes the second time before an appellate court, by appeal upon the same facts, what was decided at the first appeal constitutes the law of the case, and will not be again examined touching its soundness. (Citing cases.) 'An actual decision of any question settles the law in respect thereto for future action in the case.' (Citing case.) The object of the rule is that there may be an end to litigation, and that speculation on changes in the membership of the court may be prevented."

In the case of *City and County of Denver v. Denver Tramway Corp.* (C. C. A. 8, 1927), 23 F. 2d 287, the Court stated the rule as follows:

"* * * *in so far as the jurisdictional questions now presented were presented and decided upon the former appeal, they are no loger open to review.* That decision has become the law of the case." (Italics ours.)

In 3 Am. Jur., page 541, *et seq.*, the reason for the rule is explained as follows:

"Sec. 985. GENERALLY.—It may be stated generally that a court of review is precluded from agitating

questions which were propounded, considered, and decided on a previous review. The decisions agree that as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal, provided the same facts and issues which were determined in the previous appeal are involved in the second appeal. * * *

If the reviewing court, upon the consideration of the first appeal, makes a final disposition of the issues, leaving none of those disposed of to be retried after the mandate, there is, of course, on a second appeal from the judgment entered in accordance with the mandate, an added reason for considering all decisions on the first appeal conclusive upon the second appeal.

* * * * * * * * *

Sec. 986. ORIGIN OF, AND REASON FOR, DOCTRINE.—The doctrine of the law of the case is not a rule laid down by legislative enactment, but one laid down by the courts themselves.

Various reasons have been assigned for the doctrine of the law of the case. Some courts base the rule upon the doctrine of *stare decisis*, some on the doctrine of *res judicata*, and others on both doctrines. * * *"

When you consider the reason for the rule, that is, that the law of the case has been established, it becomes apparent that the rule does not apply in this case, because the law of the case on the questions now sought to be reviewed was not established by the Court in the Denunzio appeal the only question which the Court ruled upon being as to the validity of the contract under the Emergency Price Control Act.

POINT C.

On a Second Appeal the Court May Consult Its Opinion on the First Appeal to Determine What Was Intended by Its Mandate.

In its mandate to the District Court, this Court stated:

> "The conclusions of law entered by Judge Carter are vacated and set aside and the judgment entered by him is reversed with directions to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor."

Judge O'Connor had held that the contract was valid—Judge Carter held that it was invalid, and upon the appeal the Court held:

> "The primary question presented by this appeal has to do with the legality of the contract. We have carefully considered the fact situation presented by this record and the findings of fact and conclusions of law entered by both trial judges. Upon this record we are satisfied that Judge O'Connor's findings of fact are supported by substantial evidence, and that his conclusions of law are supported by his findings of fact. We think that Judge Carter erred in setting aside these findings of fact and conclusions of law and that the conclusions of law entered by Judge Carter are erroneous."

Examining the opinion of the Court of Appeals proves conclusively that on the Denunzio appeal said Court considered only the question of the legality of the contract.

It is proper for the Court to consult its opinion on the former appeal to determine what was intended by its mandate. The rule in this regard is laid down by the Court in the case of *Sanford Fork & Tool Co.*, 160 U. S. 247, 40 L. Ed. 414, in the following words:

"* * * The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and * * * upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. (Citing cases.)"

See, also:

3 Am. Jur., Sec. 985, p. 541.

Consulting the opinion of this Court, it becomes evident that this Court did not rule upon the questions now sought to be reviewed.

POINT D.

The Questions Now Sought to Be Reviewed Were Not, and Could Not Have Been, Reviewed by the Court of Appeals on the Denunzio Appeal.

The various questions which Crane sought to have the Court of Appeals review were not, and could not have been reviewed by said Court on the Denunzio appeal because they were non-existent so far as the record is concerned, as will appear from the following:

Questions 1, 2 and 3 deal with whether (1) a contract was entered into, (2) the terms of a contract were ever agreed upon by all of the parties, (3) Denunzio performed the conditions precedent to a binding contract, or did he breach same.

These questions involve conclusions of law from findings of fact. Judge O'Connor concluded there was a valid contract and that the terms were agreed upon and that there were no conditions precedent necessary to be performed by Denunzio, and that there was no breach by Denunzio. [R. Vol. I, p. 145.]

Judge Carter did not draw any such conclusions of law. Therefore on an appeal from Judge Carter's decision the question as to the sufficiency of Judge O'Connor's conclusions of law was not, and could not have been, decided by the Court of Appeals.

The fourth question of law presented is as to the statute of frauds. Judge O'Connor held in his conclusions of law that the statute of frauds of California had been complied with but made no reference to the statute of frauds of Kentucky. [R. Vol. 1, p. 145, Sec. III, sub. 2.] Judge Carter did not draw any conclusions of law on the question of the statute of frauds. Therefore on appeal from Judge Carter's decision the question as to the sufficiency of such conclusions of law was not, and could not have been decided by the Court of Appeals.

The fifth question of law presented is as to whether or not Crane was agent for a disclosed or undisclosed principal. Upon his findings of fact Judge O'Connor held that Crane was acting as an agent for an undisclosed or partially disclosed principal. [R. Vol. 1, p. 147, Sec. V, sub. 10.]

Judge Carter made no such conclusions of law and therefore on an appeal from Judge Carter's decision, the sufficiency of such conclusions of law was not, and could not have been, decided by the Court of Appeals.

Crane contends that the documents set forth in the findings of fact show that Crane disclosed his agency and the name of the agent, and therefore Judge O'Connor erred in his conclusions of law that Crane was an agent for a partially disclosed or undisclosed principal. This question was non-existent under Judge Carter's conclusions of law, therefore the Court of Appeals could not have ruled on same.

Question No. 6 deals with the question of proper measure of damages. Judge O'Connor, in his conclusions of law [R. Vol. 1, p. 146, Sec. IV] held that the measure of damages was the difference between the contract price and the price at the time delivery should have been made. The evidence showed that immediately upon the alleged breach of contract (October 15, 1945) Demmzio bought three replacement cars from Arena & Co. of Los Angeles, California, at a price of $3.50 a box, plus 20c a box storage. At the trial he contended that these cars were not replacement cars but cars which he bought after the date of delivery (Dec. 10, 1945, being the claimed date of delivery) at a price of $4.50 a box for 2 cars and $3.70 a box for one car, were the replacement cars. Judge O'Connor found that two cars of the $4.50 a box oranges were the replacement oranges and that the measure of damages should take into consideration the value at, or subsequent to, the contractual date of delivery. These questions require a review of the evidence before Judge O'Connor.

Crane contends that in view of the fact that Demmzio went out and purchased replacement cars immediately upon the alleged breach that such act constituted an acquiescence in the breach and that the measure of damages was the difference between the contract price and the market value at the date of acquiescence in the breach.

Judge Carter made no conclusions of law on the question of damages. Therefore on an appeal from Judge Carter's decision the question as to the sufficiency of such conclusions of law was not, and could not have been, decided by the Court of Appeals.

The 7th question involved is as to whether or not Judge O'Connor erred in allowing Demmzio $3,000.00 as attorney's fees. Judge Carter made no such allowance in his

conclusions of law or judgment. Therefore the question as to whether such allowance was excessive was not, and could not have been decided by the Court of Appeals in the Denunzio appeal.

Question 8th deals with the sufficiency of the evidence to support certain findings and whether certain specified conclusions of law are supported by the findings of fact. The question as to whether the findings of fact are supported by the evidence was not before the Court of Appeals because the evidence on which Crane intends to rely was not in the printed record and therefore said Court did not consider the question as to whether or not the evidence supported the findings of fact.

POINT E.

The Questions Now Sought to Be Reviewed by Appellant Crane Were Impliedly Decided by Judge Carter in His Favor.

The various questions of law now sought to be reviewed by the Court of Appeals and which were originally presented to Judge O'Connor were, on the hearing of the motion for a new trial, impliedly decided by Judge Carter in favor of Crane.

Judge Carter made no specific conclusions of law on these questions but had be been of the opinion that the questions should have been decided adversely to Crane he no doubt would have entered conclusions of law on these questions adverse to Crane. Not having done so, he impliedly ruled on said questions in favor of Crane.

The ruling of Judge Carter on these questions being in favor of Crane, Crane could not have appealed therefrom, as will hereafter be pointed out.

POINT F.

Questions Which Might Have Been, but Were Not, Decided on the First Appeal, May Be Considered on a Second Appeal Where the First Judgment Was Reversed.

As heretofore pointed out, there was only one question considered on the appeal of Denunzio and that was as to whether or not the contract was in violation of the Emergency Price Control Act. There were many other issues and questions presented at the trial of this action and decided by Judge O'Connor. Assuming for the sake of argument that these questions decided by Judge O'Connor could have been urged on the first appeal, these same questions can be urged on the second appeal because the first appeal resulted in a reversal.

The rule in this regard was laid down by this Court in the case of *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 48 L. Ed. 788. The Supreme Court reversed the judgment on the first appeal. After this reversal the pleadings were amended and the case retried. In holding that other issues could be raised on the second trial and on the second appeal this Court stated:

> "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a

reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. *Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.* * * * Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration." (Italics ours.)

The Appellate Court reversed the judgment of Judge Carter; therefore, on a second appeal Crane is entitled to have the Appellate Court review any and all questions which were not decided on the first appeal.

POINT G.

Crane Had No Right to Appeal From the Judgment in His Favor and His Cross-appeal Was Defensive Only.

The judgment entered by Judge Carter on granting the motion for a new trial being in favor of Crane, Crane had no right of appeal from said judgment.

In the case of *Farnsworth v. Hazlett,* 197 Iowa 1367, 199 N. W. 410, 38 A. L. R. 814, the court considered a similar question and stated the rule as follows:

"The motion for new trial contains six separate and distinct grounds. The trial court passed upon one of the grounds only, and as to the other grounds it was not deemed necessary to express any opinion or make any ruling. This did not even inferentially overrule the other grounds, but it does indicate that

they were not considered controlling by the court. Plaintiff could not appeal, as there was no ruling against her * * *."

In the case of *N. Y. Telephone Co. v. Maltbie,* 291 U. S. 546, 54 Sup. Ct. 443, 78 L. Ed. 1041, the court held that where an appellant obtained an injunction enjoining the enforcement of rate orders as being confiscatory, it is not entitled to prosecute an appeal from the decree in its favor for the purpose of reviewing the portions of the decree fixing the value of appellant's property for certain specified years and the rate of return to be allowed.

The same rule was laid down in the case of *Lindheimer v. Illinois Bell Telephone Co.,* 292 U. S. 151-82, 54 Sup. Ct. 658, 78 L. Ed. 1182.

See also:

2 Am. Jur., pp. 943-45, Secs. 152 and 153.

Crane would not have had the right to appeal from Judge Carter's decision for the purpose of reversing any part of same.

While Crane filed a cross-appeal from Judge Carter's judgment, the cross-appeal was filed solely for the purpose of presenting a portion of the evidence to show that Crane was the agent of the buyer and not the agent of the seller—both Judge O'Connor and Judge Carter had made findings to the effect that Crane was the agent of the seller.

On the cross-appeal Crane contended that even though the Court might be of the opinion that the contract was valid, still in view of the evidence that Crane was the agent of the buyer and not the seller, Crane could not be liable for a default on the part of the seller. A decision on this question adverse to Crane on the Denunzio appeal

could not constitute a ruling upon the various questions which Crane now seeks to have reviewed by this Court.

We submit that the Court of Appeals erred in dismissing the Crane appeal as said Court had never considered or ruled upon the questions which Crane sought to have said Court consider and review on his appeal.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and that to such end a writ of certiorari may be granted and that this Court should review the decision of the United States Court of Appeals, for the Ninth Circuit, and reverse same with directions to said Court to reinstate the appeal taken by Crane from the judgment of the United States District Court.

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Of Counsel.

FILED
JUL 31 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1952.

No. 176

RAYMOND M. CRANE, Doing Business As Associated Fruit Distributors, - - Petitioner,

versus

JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, and JOHN C. KAZANJIAN, Doing Business As Red Lion Packing Company, - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

I.

OPINIONS OF COURTS BELOW AND OF SECRETARY OF AGRICULTURE.

The order of the Secretary of Agriculture was dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139 (R., pp. 63-79).

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117 (R., pp. 82-137, 139-152).

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962 (R., pp. 164-184).

The decision of the United States Court of Appeals on the first appeal was rendered and filed April 16, 1951, and is reported in 188 Fed. 2d 569 (R., pp. 268-274).

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951 (see 188 Fed. 2d 569) (R., p. 274).

Certiorari was denied by this Court on October 8, 1951, 96 L. Ed. 30, Case 109.

No opinion was written by the Court of Appeals in granting the motion to dismiss the second appeal or in denying the rehearing (Minute Orders, R., pp. 325 and 338).

II.

JURISDICTION.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo*, the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural

Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in Section 240 of the Judical Code, 28 U. S. C. A., Section 1254.

III.

STATUTES AND REGULATIONS INVOLVED.

No statutes, other than the jurisdictional statutes just mentioned, are directly involved in this proceeding.

IV.

STATEMENT OF FACTS.

As a statement of the facts which this Court must consider in passing upon this Petition for Certiorari, we adopt the statement which petitioner sets forth in his Petition for Certiorari under the heading "Summary and Statement of Matters Involved," beginning on page 2 of his Petition with the following exception. Where petitioner says (top page 6) that Denunzio's Brief on the first appeal shows that the only question "presented or decided" was as to the validity of the contract under the Emergency Price Control Act, we

can only agree that this shows it was the only question *seriously urged* at that time.

We do not feel that any of the facts related under the heading of "III, Statement of Facts" (page 13, Petitioner's Brief in Support of Petition for Writ of Certiorari) are pertinent to the question which this Court is called upon to decide at this time; hence we do not now undertake to affirm or contradict any of the statements therein set forth. However, we do not wish to be understood as intending to waive the right to add to or contradict such Statement of Facts, should certiorari be granted.

V.

QUESTIONS INVOLVED.

Did the Court of Appeals for the Ninth Circuit err in dismissing the appeal taken by Crane, and in denying rehearing of said matter?

To answer this question, it is necessary to decide whether the judgment appealed from was appealable, which, in turn, depends upon whether such appeal raised any questions which were not and could not have been decided on the previous appeal and the previous Petition for Certiorari.

VI.

REASONS RELIED UPON FOR DENIAL OF WRIT AND SUMMARY OF ARGUMENT.

Respondent contends that the Writ of Certiorari should be denied for the following reasons:

(1) The mandate of the Court of Appeals for the Ninth Circuit directed the District Court to set aside the judgment of Judge Carter and to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor (R., p. 273). Since the latter judgment manifestly disposed completely and fully of the entire cause, the mandate, by derivation so to speak, had the same effect and left nothing to be determined by the District Court. The judgment entered by the District Court was thus, in effect, the judgment of the Court of Appeals and could not be appealed to the same Court.

(2) The decision and mandate of the Court of Appeals was in no way erroneous insofar as it undertook to dispose of the entire cause, and not confine itself to ruling on the issue which Judge Carter had determined adversely to plaintiff. Defendant, in the first place, had perfected a cross-appeal from so much of the judgment as determined the facts adversely to him, and, in the second place, the entire record was before the Court, and this included a transcript of all the evidence adduced by either side upon a complete trial of all the issues, coupled with complete findings of fact and conclusions of law by the judge who heard the case.

(3) Even if the mandate of the Court of Appeals was erroneous to the extent that it ordered the reinstatement of Judge O'Connor's judgment (which we strenuously deny), that error in turn could have been, and should have been reviewed and corrected by this Court in passing on the previous Petition for Writ of Certiorari.

(4) The questions sought to be raised herein are not of sufficient importance or gravity to require granting the writ.

VII.

ARGUMENT.

POINT 1. The District Court's Judgment Was Not Appealable Since It Followed the Mandate of the Court of Appeals.

When the first appeal was presented to the Court of Appeals, it found the record in this situation: Judge O'Connor, who had heard the case, had held:

(1) That there was a contract,

(2) That it ws valid and enforcible,

(3) That the facts concerning its breach were substantially as contended by the plaintiff (respondent here), and

(4) That plaintiff was entitled, on the law, to a judgment for a specified sum of money.

Subsequent to Judge O'Connor's death, his successor, Judge Carter, in ruling on defendant's motion for a new trial, found the contract to be invalid, or unenforcible, as in violation of the Emergency Price Control Act of 1947, and hence, he (properly enough, granting the premise) set aside Judge O'Connor's judgment and dismissed the complaint. Plaintiff appealed from this judgment and defendant cross-appealed, and the entire record, including the transcript of evidence, went up.

In this situation, the Court of Appeals was faced, as we see it, with three basic alternatives. It could (1) agree with Judge Carter that the contract sued upon was unenforcible as being in violation of the Emergency Price Control Act, in which event, his order dismissing the complaint was manifestly proper; it could (2) disagree with his conclusion of law on that point, but either conclude that the facts (or some other question of law involved) were against plaintiff, or that there was not sufficient evidence to determine those questions and remand for further proof; or it could (3) disagree with Judge Carter and concur with Judge O'Connor, not only on the question of the enforcibility of the contract, but on all facts found and questions of law decided by the latter. It is clear that where the record on appeal is complete and contains appropriate findings of facts and conclusions of law, the appellate court on reversal may direct the entry of a final judgment. *Sanderson* v. *Portal Life Insurance Company of New York*, 87 F. 2d 58 (10th Cir. 1937); *Lydon* v. *New York Life Ins. Co.*, 89 F. 2d 78 (8th Cir. 1937); *Maryland Casualty Company* v. *United States to use of Heyward*, 108 F. 2d 784 (4th Cir. 1940); *Amende* v. *City of Bremerton*, 36 Wash. 2d 333, 217 P. 2d 1049 (1949). The last cited case seems particularly analogous to the situation presented here, and we quote from the decision (217 P. 2d at page 1054):

> "The trial court, as indicated above, determined at the first hearing that the sum of $1,990.00 consisting of principal on the sixteen bonds and

> interest at the rate of seven per cent per anum as called for in the bonds, was owing to appellant. The trial court also determined at that time that there had been sufficient proceeds from the sinking fund sales to pay this sum. The original findings and conclusions to this effect were not carried forward into the 'corrected' findings of fact and conclusions of law entered after the second hearing. No additional evidence or argument was received at the second hearing bearing upon the amount due appellant or the extent of the diversions. It is therefore clear that the only reason these recitals were not included in the 'corrected' findings is that they were not pertinent to the issues relative to the filing of a claim and the running of the statute of limitations, which issues the trial court, at the second hearing, considered controlling. As previously noted, the finding as to the extent of the misapplication of sinking fund profits was based upon an agreed exhibit. *For these reasons, we believe that this case may be disposed of without the necessity of taking further evidence or the entry of additional findings of fact and conclusions of law.*" (Emphasis added.)

The court then directed the entry of a judgment based on the original findings and conclusions, having previously found error in the trial court's ruling on the Statute of Limitations question.

Having concluded, as it did, that Judge Carter's principal conclusion was erroneous, it seems obvious that, to dispose of the case, the Court of Appeals necessarily had to select one of the two latter alternatives mentioned above.

In fact, it selected the third; and in so doing, it is clear that it fully and finally determined all the issues in the case, both law and fact, in favor of the plaintiff (respondent here). The findings and conclusions of Judge O'Connor were adverse to the defendant at all points and fully and finally disposed of the case. It is, in essence, from these findings and conclusions that defendant is now attempting to appeal. But the mandate of the Court of Appeals directed the District Court to reinstate those findings and conclusions, thus by any reasonable interpretation, affirming them. It is almost too well settled to admit of argument that a judgment entered strictly in accordance with the mandate of an appellate court is not subject to a second appeal. *Stewart* v. *Salmon,* 97 U. S. 361, 24 L. Ed. 1044; *Humphrey* v. *Baker,* 103 U. S. 736, 26 L. Ed. 456; *Aspen Mining and Smelting Company* v. *Billings,* 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986; *United States* v. *New York Indians,* 173 U. S. 464, 19 S. Ct. 464, 43 L. Ed. 769. In one case, *Great Northern Railway Company* v. *Western Union Telegraph Company,* 174 Fed. 321 (8th Cir. 1909), the Court stated the principal rather clearly, saying:

> ". . . when an appellate court definitely describes the decree to be entered in the Court below, there is no discretion in the latter court; but it is its duty to obey the mandate and enter the decree accordingly. The decree when entered in the court below according to the mandate, *is the decree of the appellate court,* and an appeal from it will be dismissed for it would be in effect an appeal

to the appellate court from its own decree." (Emphasis added.)

It is well recognized, of course, that second appeals will lie where it is alleged that the mandate has not been properly executed, *The Lady Pike,* 96 U. S. 461, 24 L. Ed. 672; or where questions were left open by the mandate or decision of the appellate court on the prior appeal. *Ex Parte Union Steamboat,* 178 U. S. 317, 20 S. Ct. 904, 44 L. Ed. 1084; *Hinckley* v. *Morton,* 103 U. S. 764, 26 L. Ed. 458; *Re Sanford Fork and Tool Company,* 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414. Neither of these situations, however, are present in the instant case, although it will be noted that the cases just cited are the principal ones cited and relied upon by petitioner in support of his present position. This brings us to the second point.

POINT 2. The Court of Appeals Did Not Err in Directing the Type of Judgment To Be Entered.

Although it is nowhere expressly stated in petitioner's brief, it is clearly his argument that at the time of the first appeal, the findings and conclusions of Judge O'Connor were not properly before the Court of Appeals. This is implied by his persistent statement that "the questions now sought to be reviewed were not and could not have been reviewed by the Court of Appeals on the Denunzio appeal" (Petitioner's Brief, p. 17, Point D) and by his citation of the *Union Steamboat* and *Sanford* cases, *supra.* As to the "were not," the short answer is that they manifestly were,

since the mandate ordered the reinstatement of, and thus affirmed, Judge O'Connor's findings and conclusions, the correctness of most of which is the very question "now sought to be reviewed." As to the "could not have been," petitioner *assumes* that, and goes on to argue that hence they are now reviewable. Were his premise only correct, his conclusion would be inescapable. But a faulty premise is the defect in many an otherwise unassailable syllogism..

If Judge O'Connor had reached the same conclusion that Judge Carter later did as to the invalidity or unenforcibility of the contract sued upon, and dismissed the complaint without hearing the factual issues, it is quite true that, upon plaintiff's appeal from that judgment, the facts and the other legal issues (in other words, anything not decided by Judge O'Connor) would not have been before the appellate court. *Campbell* v. *Campbell*, 313 Ky. 249, 203 S. W. 2d 913 (1950). It would then have had only two alternatives: (1) affirmance, or (2) reversal with remand for trial on the merits. Had the latter been selected, an appeal by the losing party would have been proper after the trial. But that, of course, was not the situation when the case reached the Court of Appeals for the first time. Judge O'Connor had heard an exhaustive trial of the issues tendered, and had entered exhaustive findings and conclusions with respect thereto, all of which, together with the transcript of evidence which formed the basis therefor, was in the record which went up to the Court of Appeals. The mere fact that the issue of enforcibility of the contract under the Emergency Price Con-

trol Act, *supra*, was felt by counsel for both sides to be the primary issue at that time, as reflected in their briefs, could not operate to deprive the Court of Appeals of jurisdiction to determine any other questions properly before it. It was an essential part of Judge Carter's judgment (which, it is true, was technically the judgment appealed from) that Judge O'Connor's findings and conclusions be set aside. The Court of Appeals in ruling on the correctness or incorrectness of Judge Carter's judgment was manifestly called upon to determine the correctness of Judge O'Connor's findings and conclusions, and it would be absurd, we feel, to argue that, because of the technicality that it was Judge Carter's judgment being reviewed, the Court of Appeals was bound, if it reversed, to remand for new trial without considering whether or not there were any errors in the record of the former trial which had been conducted. This record, as petitioner admits (Petition for Certiorari, p. 7), was before the court. After all, there must be an end to litigation some time.

POINT 3. Had the Court of Appeals Erred in Directing the Type of Judgment To Be Entered, This Court Could Have Corrected Such Error on the First Petition for Certiorari.

Finally, even if there were an error in the mandate of the Court of Appeals on the first appeal in directing the judgment to be entered, surely such an error was as much subject to the review of this Court as any other which might have been committed by the Court of Appeals. *Panama R. Company* v. *Napier Shipping*

Company, 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004. Consequently, in denying the Petition for Writ of Certiorari on the first occasion, this Court in effect affirmed the decision of the Court of Appeals on all points—not only those which petitioner expressly raised, but all those which could have been raised. In other words, the "law of the case rule" arises as a bar to the granting of certiorari in this instance, since that rule says that the decision and mandate of this Court on the previous Petition for Certiorari are conclusive on a second Petition as to all issues which were or *could have been* raised on the first Petition. *United States Trust Company* v. *New Mexico,* 183 U. S. 535, 22 S. Ct. 172, 46 L. Ed. 315. We do not feel that this argument is in any way in conflict with the long line of cases holding that denial of certiorari constitutes no expression of opinion on the merits and creates no precedent. (Cases cited under Annotation 17, 28 U. S. C. A. 1254.) That rule is a part of the doctrine of *stare decisis,* while we are here contending for an application of the doctrine of *res adjudicata.*

POINT 4. This Petition Fails to Present Any Grave Question.

The issues which petitioner asks this Court to order the Court of Appeals to review, viewed in the light most favorable to petitioner, do not involve any questions other than the purely private rights of the parties as between themselves. No public questions, important or otherwise, are involved, there is no conflict shown between the various circuits, and none of the factors which traditionally induce this Court to grant certiorari are present.

CONCLUSION.

In conclusion, we will summarize our argument as briefly as possible.

(1) The issues now sought to be raised were considered and disposed of on the previous appeal in the Court of Appeals.

(2) The action of the Court of Appeals in considering and determining on the previous appeal the issues now sought to be raised was proper.

(3) If the Court of Appeals were in error in considering and determining on the previous appeal the issues now sought to be raised, that error could and should have been corrected by this Court when it was previously petitioned to grant a writ of certiorari, and its order denying certiorari has concluded that question along with those which were then expressly raised.

Accordingly, certiorari should be denied and it is respectfuly so moved.

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